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BRIBERY**Effective Corporate Compliance and the Irrelevant ‘Foreign Official’ Debate**

BY PHILIP UROFSKY AND JESSICA BARTLETT

On Nov. 14, the Department of Justice and the Securities and Exchange Commission issued the long-awaited guidance on their enforcement policy concerning the Foreign Corrupt Practices Act.¹ Among other topics, it set out their view of what factors qualify a foreign entity as an instrumentality of a foreign government, such that its employees would be deemed government officials for purposes of the FCPA.

Not surprisingly, the guidance hews closely to the factors the government has previously articulated in charging instruments and largely adopted by various trial courts. This has obviously disappointed those critics who had hoped, although it is not clear why, that the

¹ 07 WCR 871 (11/16/12).

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government would backtrack from these previously articulated positions.

However, from the perspective of corporate compliance, the impact of the guidance’s discussion of instrumentalities is exceedingly minimal. It is a rare—and likely dangerously ineffective—compliance program that attempts to split hairs between bribes paid to private individuals and bribes paid to officers of government instrumentalities.

The Emerging Definition of Instrumentality

To violate the FCPA’s anti-bribery provisions, a corrupt payment must be made to a “foreign official.” The statute defines such foreign officials to include not only officers or employees of the foreign government itself but also officers or employees of “instrumentalities” of that government.

What constitutes an instrumentality has spilt significant amounts of ink over the past several years. The term is not defined by the statute, and, because a substantial number of FCPA cases against corporations are resolved through deferred and nonprosecution agreements, it has received little judicial scrutiny until recently.

Yet, particularly in cases involving individuals, the definition of instrumentality can be the critical fact: If the alleged bribe was not paid to a government official or an official of a government instrumentality, there is no violation of the FCPA and the defendant is no longer at risk of being jailed or fined—at least under the FCPA, although other federal and state statutes may apply.

The courts that have addressed what constitutes an instrumentality have adopted a factor-based approach to the analysis and have identified an array of non-exclusive factors for juries to consider. These include:

- the foreign state’s characterization of the entity;
- the foreign state’s extent of ownership;
- the foreign state’s degree of control over the entity;
- the purpose of the entity’s activities;

- the service the entity provides;
- the status of any officers or directors as government officials;
- the foreign state's level of financial support;
- the circumstances surrounding the entity's creation; and
- whether the entity is perceived and understood as performing official functions.

To some commentators, this fact-specific inquiry is fatally flawed because it does not provide a bright-line rule and may result in diverging results as juries and judges weigh the factors differently in different cases. As we note below, however, although the factors may create a narrow gray zone of unpredictability, a well-designed compliance program will not allow the corporation to play in that zone anyway.

A Ray of Light?

After much anticipation, DOJ and the SEC released "A Resource Guide to the U.S. Foreign Corrupt Practices Act" on Nov. 14. Almost immediately, some commentators complained that the government had failed to provide much concrete guidance and had instead closely hewed to the fact-specific, factor-based analysis previously used by it and the courts. Indeed, the guide mainly collects the factors previously identified in several district court opinions and jury instructions. These factors largely look at the ownership and control of the entities, the level of financial support provided by the government, the entity's activities and purposes, and how the entity is perceived by the government or generally.

In support of the non-exclusive, factor-based and fact-specific approach, the guide highlighted the need for a flexible approach that can take into account the variety of manners in which governments are organized and operate through state-owned or controlled entities. But it did provide some hints as to which factors may have more weight for DOJ and the SEC. It said that even though no one factor is dispositive or more important, the focus of the inquiry should center on an entity's "ownership, control, status, and function." Further, the guide noted that an entity would be unlikely to qualify as a government instrumentality if a government did not own or control more than a majority of the entity's shares. While the guide also noted that in certain circumstances an entity in which the government owned a minority share could still be an instrumentality—for example, when the government holds veto power over major expenditures and operations and senior officers are political appointees—the fact of minority ownership appears to weigh against finding that an entity is an instrumentality.

Minimal Impact on Compliance

From a corporate compliance perspective, whether a particular entity is an instrumentality is largely irrelevant. It would be a rare compliance program that was designed to prohibit only bribes of public entities. Certainly the risk of an enforcement action is greater for public bribes than for commercial bribes, but there are a myriad of legal risks associated with any bribery. An

effective compliance program will focus on preventing and detecting corrupt payments, whether paid to public or private officials, and will not waste time and effort on drawing thin lines between acceptable and unacceptable bribes. In fact, the guidance recognizes as much when it warns companies to "remember that, whether an entity is an instrumentality of a foreign government or a private entity, commercial (i.e., private-to-private) bribery may still violate the FCPA's accounting provisions, the Travel Act, anti-money laundering laws, and other federal or foreign laws. Any type of corrupt payment thus carries a risk of prosecution." Particularly for multinational companies, allowing commercial bribery is not a particularly rational method to avoid legal liability.

Furthermore, allowing some form of bribery can also significantly weaken the effectiveness of a compliance program. First, it is poor messaging. A policy that some forms of bribery are acceptable, or that only certain forms of bribery are prohibited, signals to some degree that the company tolerates or expects some bribery by its employees and agents. Instead of fostering a culture of compliance, such messaging can breed a culture of "what can I get away with?" Such a culture presents significant risk that personnel will cross the line and subject the corporation and themselves to criminal liability.

Second, allowing or acquiescing to commercial bribery while prohibiting public bribery significantly weakens internal financial controls. Unchecked commercial bribery means that money may be flowing out of the company outside of those controls. Moreover, if a corporation attempts to prohibit public bribery but permit private bribery, there is also significant risk that someone will get it wrong; that what was presumed to be a permissible bribe was actually prohibited. Given the fact-specific nature of the definition of an instrumentality, personnel may quite easily end up on the wrong side of the line, particularly when they are working with imperfect information or under time pressure, which are not uncommon occurrences in the real world.

Third, a compliance program that requires or allows employees to distinguish between permissible commercial bribery and impermissible public bribery can become unwieldy and unworkable. The policies and procedures would likely require personnel to engage in delicate line-drawing exercises. This not only presents a risk that personnel will get it wrong, but it also makes it difficult to craft and implement clear policies and directives. Instead of supplying personnel with guidelines that clearly delineate what is and is not acceptable, the policies either would become exacting and overly detailed or would impart significant discretion to non-legal personnel to judge the situation before them and determine whether a certain payment is permitted or prohibited under the company's policies and the anti-corruption laws of multiple jurisdictions.

What Is the Relevance of Instrumentality For 'Real World' Compliance?

As the Organisation for Economic Cooperation and Development and others have recommended, a compliance program should address the particular anti-corruption risks faced by an organization. Getting mired in details and evolving legal definitions of what

entities constitute instrumentalities can obscure the actual compliance risks and make a program overly complicated. Thus, in the broadest sense, it does not matter to a corporation whether the recipient of a bribe is an employee of a private company, a government instrumentality, or the government itself.

The definition of instrumentality comes into play in the area of gifts, entertainment, travel, and other forms of hospitality. The issue here is not so much whether the corporation is paying bribes but whether it is crossing the line of what it is permitted to offer a government official or what that government official may accept, irrespective of whether it is offered for entirely legitimate and transparent purposes. Accordingly, the focus should really be on whether a certain expense can be considered a bona fide business expenditure.

Whether an expense is bona fide will have much more to do with what is being spent, how, and for what purpose and much less to do with whether the person on the receiving end is an employee of an instrumentality or of a private corporation. For example, even in the United States, government officials, including DOJ attorneys, are permitted to accept limited hospitality from their colleagues in the private sector, but the scope of such hospitality is narrowly constrained (e.g., \$20 per

occasion). Corporations should, accordingly, be aware of such limits and ensure that they observe them and not put their government customer in awkward or even illegal situations.

Make Compliance Quick and Easy

Compliance programs need to work in real time with at times imperfect information. They also must be digestible to non-lawyers, who have neither the time nor patience for legalese and nuance. Clear policies and procedures, such as those that prohibit all bribery, ensure that personnel on the ground can quickly and effectively comply. They also ensure that those who design, implement, and oversee the program can focus their energies and scarce resources on significant compliance risks instead of constantly assessing whether certain entities fall in or out of the varying and evolving definitions of instrumentality. Expending scarce resources to implement compliance policies that attempt to parse between “acceptable” bribes paid to private entities and unacceptable public bribes paid to instrumentalities threatens to waste time and effort better spent on clear policies that address the corporation’s compliance risks and prohibit all bribes.